No. 11924

# In the United States Circuit Court of Appeals for the Ninth Circuit

A. G. ROLE, APPELLANT

*v.*

J. NEILS LUMBER COMPANY, A CORPORATION, APPELLEE

THE UNITED STATES OF AMERICA, INTERVENOR

*UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA*

## BRIEF OF THE UNITED STATES AS INTERVENOR

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# INDEX



## CITATIONS

Cases:

Cases—Continued Page

Cases—Continued Page

Cases—Continued

Cases—Continued



## CONSTITUTION AND STATUTES

Page

MISCELLANEOUS

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## STATEMENT

### (a) Jurisdiction

Appellant, on behalf of himself and other present and former employees of Appellee, instituted this action in the District Court of the United States for the District of Montana, to recover overtime compensation under the Fair Labor Standards Act of 1938 (R. 2-3), based upon time spent by them in walking

and in preliminary and other activities on the premises of Appellee both before and after the regularly scheduled work periods (R. 4-6).

The jurisdiction of the District Court was invoked under Section 41 (8) of Title 28 of the United States Code, which authorizes the District Courts to hear and determine causes arising under laws regulating commerce, as well as under Section 16(b) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b). The grant of jurisdiction to this Court to entertain the appeal is lodged in the provisions of Section 128(a) of the Judicial Code, as amended, 28 U.S.C. § 225(a).

Upon the enactment of the Portal-to-Portal Act of 1947, Appellee invoked the provisions of that Act as defenses to Appellant's claims (R. 14, 18-21), and in opposition thereto Appellant, among other things, questioned the constitutionality of that Act. After the hearing, the District Court sustained the constitutionality of the Portal Act on December 19, 1947 (R. 26-30), and the action was dismissed on December 30, 1947 (R. 31-32).

This appeal was thereupon entered by Appellant (R. 32-33).

Pursuant to the Act of August 24, 1937, c. 754, § 1, 50 Stat. 751, 28 U. S. C. § 401, the United States has intervened in support of the constitutionality of the Portal Act (R. 22-25). In view of the limited nature of the intervention, the Government in this case, as in others, takes no position as to any issues relating to the factual applicability of the Act beyond discussing the meaning of its sections to the extent deemed relevant to the constitutional questions.

While this brief deals primarily with the arguments that have been advanced by Appellant in this case, it is not confined to such arguments but covers as well all respectable related arguments which have thus far come to our attention in connection with litigation involving attacks upon the constitutionality of the Portal Act throughout the country. Accordingly, a mere reference to a contention that the Act is unconstitutional will not necessarily imply that the present Appellant has advanced or relies upon it.

**(b) The statutes involved**

Pertinent excerpts from the Portal-to-Portal Act of 1947 (Act of May 14, 1947, Ch. 52, 61 Stat. 84, 29 U. S. C. § 251-262) and the Fair Labor Standards Act of 1938 (Act of June 25, 1938, Ch. 676, 52 Stat. 1060; as amended, 29 U. S. C., § 201-219) appear at appropriate points in the brief, *infra.*

**(c) Summary of legislative history of the Portal-to-Portal Act of 1947**

On June 10, 1946, the Supreme Court, in the case of *Anderson* v. *Mt. Clemens Pottery Co.,* 328 U. S. 680, decided that employees covered by the Fair Labor Standards Act of 1938 were, under Section 7 (a) of that Act (29 U. S. C., § 207 (a)), entitled, in the computation of their statutory work week for overtime compensation purposes, to have included as working time the minimum time necessarily spent by them on their employer's premises walking from time clocks to places of productive work and time spent in certain preliminary activities, such as putting on aprons and overalls and preparing equipment for productive work,

provided they were thus "required to give up a substantial measure of" their "time and effort" (*id.* 692). In so deciding, it reversed the decision of the United States Circuit Court of Appeals for the Sixth Circuit (149 F. 2d 461) and ordered remand of the case to the District Court of the United States for the Eastern District of Michigan "for the determination of the amount of walking time involved and the amount of preliminary activities performed, giving due consideration to the *de minimis* doctrine and calculating the resulting damages under the Act" (328 U. S. at 694).

Following the decision of the *Mt. Clemens* case numerous suits seeking very substantial sums, purporting to rest on the decision, were filed throughout the country.[1] These actions, which created a potential liability for billions of dollars in so-called portal-to-portal claims on the part of employers, had the unfortunate effect of impairing their credit, interfering with collective bargaining with employees, and retarding reconversion to peacetime production.[2] Accordingly, the 80th Congress which convened in January 1947 gave the "portal-to-portal" problem early attention. Various bills were introduced in both houses and were referred to the committees on the judiciary where ex-

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[1] As of January 31, 1947, the Administrative Office of the United States courts reported that 1515 cases had been filed in which the aggregate claims totaled $5,785,204,606, not counting 398 cases in which the amounts of the claims were not stated. (Senate Rept. No. 48, Part 1, p. 2, to accompany H. R. 2157, 80th Cong., 1st Sess.).

[2] The Portal-to-Portal Act of 1947, Part I, Sec. 1 (Act of May 14, 1947, Public Law 49, 80th Cong., Ch. 52, 1st Sess.). The President's Message Transmitting His Approval of H. R. 2157, The Portal-to-Portal Act of 1947 (H. Doc. No. 247, 80th Cong., 1st Sess.)

tensive hearings were held. During this period the District Court for the Eastern District of Michigan, which had been considering the *Mt. Clemens* case on the order of remand, dismissed the action upon the ground, among others, that all compensable activities involved were, because of the short intervals of time devoted to them, subject to the *de minimis* doctrine enunciated by the Supreme Court (69 F. Supp. 710). On February 25, 1947, the Gwynne bill (H. R. 2157) was reported favorably to the House of Representatives (Rept. No. 71). On February 28, 1947, the House passed the measure by a vote of 345 to 56 (93 Cong. Rec. 1630). The Senate Judiciary Committee, which theretofore had been considering Senate bills on the same subject, promptly took up the House bill and on March 10, 1947, reported it favorably, with amendments (Rept. No. 48). The Senate, on March 21, 1947, passed the bill by a vote of 64 to 24 (93 Cong. Rec. 2453).

Thereafter, the bill was submitted to a conference committee for the purpose of resolving the differences between the two houses. This committee had the bill under advisement for a full month. During this time the employees in the *Mt. Clemens* case noted an appeal to the United States Circuit Court of Appeals for the Sixth Circuit. On March 20, 1947, the United States, which had intervened in the case, petitioned the Supreme Court for a writ of certiorari (No. 1143, Oct. Term, 1946), requesting review of the decision prior to its consideration by the Circuit Court of Appeals. On April 8, 1947, the Circuit Court of Appeals dismissed the appeal on the motion of the employees (162

F. (2d) 200). Accordingly, the petition for certiorari was dismissed on the Government's motion on April 14, 1947 (331 U. S. 784). On April 29, 1947, the conference report was submitted to the Senate and the House (93 Cong. Rec. 4334; 4368) and was adopted by a voice vote in the Senate and by a vote of 173 to 27 in the House. The measure was approved by the President on May 14, 1947, and such action was announced to the Congress by a special message from the President (H. Doc. No. 247, 80th Cong., 1st Sess.).[3]

Throughout the legislative consideration of the "portal-to-portal" problem, the constitutionality of the proposed legislation was given serious and thorough consideration.[4]

**(d) Court decisions under the Portal-to-Portal Act of 1947**

The constitutionality of the Act has been upheld by three United States Circuit Courts of Appeals[5] and by more than a hundred decisions of Federal District

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[3] According to the figures reported by the Administrative Office of the United States Courts, 267 portal-pay suits had already been terminated by the end of the 1947 fiscal year on June 30, 1947, or about six weeks after the passage of the Portal-to-Portal Act of 1947. Of this number, 233 were dismissed prior to trial with the consent of or at the request of the parties. 1947 WH 1632.

[4] See, *e. g.*, H. Rept. No. 71, 80th Cong., 1st Sess., p. 6; S. Rept. No. 48, 80th Cong., 1st Sess., p. 43; 93 Cong. Rec. 2193, 2194; H. Doc. No. 247, *supra*, p. 2.

[5] *Rogers Cartage Co.* v. *Reynolds* (6 Cir.), 166 F. 2d 317; *Seese* v. *Bethlehem Steel Co.* (4 Cir.), 168 F. (2d) 58; *Battaglia* v. *General Motors Corp.* (2 Cir., decided July 8, 1948), 8 WH cases 108, 15 Labor Cases, par. 64,619; *Darr* v. *Mutual Life Insurance Co. of New York* (2 Cir., decided July 8, 1948), 8 WH Cases 124, 15 Labor Cases, par. 64,620; *Fisch* v. *General Motors Corporation* (6 Cir., decided August 2, 1948), 8 WH Cases 207, 15 Labor Cases, par. 64,674.

Courts.[6] With possibly two exceptions,[7] we are aware of no decisions to the contrary. Although the Supreme Court of the United States has had occasion to remand two cases for reconsideration because of the enactment of the statute,[8] no petition for certiorari involving the constitutionality of the Act has yet been filed.

ARGUMENT

**1. The findings and policy of the Congress set forth in Section I of the Portal-to-Portal Act of 1947 are proper and binding upon the courts. The Act does not constitute an unconstitutional usurpation of judicial power**

In most of the briefs attacking the constitutionality of the Portal-to-Portal Act of 1947, which have come to our attention in connection with litigation throughout the country,[9] it has been suggested, in one way or another, that the announcement of the findings and policy by the Congress, in Section I of the Act, was improper and either that the findings could not be considered as lending constitutional validity to other portions of the Act or that, taken together with other portions of the Act, such findings rendered the Act unconstitutional as an usurption of judicial power.[10]

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[6] The reported District Court decisions are listed in the Appendix, *infra*.

[7] *Sveltik* v. *Vultee Aircraft Corp.* (D. C., N. Tex.), 7 WH Cases 282, 13 Labor Cases, par. 64,063; *Curtis* v. *McWilliams Dredging Co.* (N. Y. City Ct.), 14 Labor Cases, par. 64,352; 7 WH Cases 757.

[8] *Alaska Juneau Gold Mining Co.* v. *Robertson,* 331 U. S. 793; *Madison Ave. Corp.* v. *Asselta,* 331 U. S. 795.

[9] See Appellant's brief, pp. 24-27.

[10] In respect of Section 1, the argument appears to attack the Congressional findings on the ground of lack of legislative power under the separation of power doctrine. (See *e. g., Kilbourn* v. *Thompson,* 103 U. S. 168, 190-191; *Marbury* v. *Madison,* 1 Cranch 137, 177-178; *B. & O. R. R. Co.* v. *United States,* 298 U. S. 349, 365.) The argument relative to alleged interference with the performance by the courts of their judicial function, is discussed in connection with Section 2 of the Act, *infra*.

At the outset it should be noted that the Fair Labor Standards Act of 1938, as originally enacted, contained, in Section 2, a statement of Congressional findings and policy, as follows:

> (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in competition in commerce; (3) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (4) interferes with the orderly and fair marketing of goods in commerce.
>
> (b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

Without disturbing the Congressional findings and policy of the Fair Labor Standards Act of 1938, the Congress, in Section 1 of the Portal-to-Portal Act of 1947, included a statement of additional findings and policy as follows:

> (a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-

established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial conditions of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of reve-

nues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost of the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost to war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare essential to national defense and necessary to aid, protect, and foster

commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

(b) It is hereby declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

These findings were made after exhaustive hearings had been conducted by the committees on the judiciary of both houses of Congress. Representatives of numerous industries and labor organizations appeared and were heard. If it were proper for the Court to review such findings under the rules governing review of judicial findings, all of them would be found to have substantial support in the transcripts of the hearings.

It cannot seriously be contended that the inclusion of a statement of findings and policy in an act of Congress is improper or violative of the Constitution, in and of itself. The practice of including them is of long standing and, as above indicated, indeed was followed in the enactment of the Fair Labor Standards Act of 1938, upon which the "portal-to-portal" claims are based. Such findings and statements of policy are of great assistance to the administrative officers and the courts in the administration and application of such statutes. Cf. *Opp. Cotton Mills* v. *Administrator,* 312 U. S. 126, 144; *United States* v. *Darby,* 312 U. S. 100, 109.

With reference to the determinations of the Congress which were recited in the legislation abrogating

claims based upon gold clauses in private bonds, the Supreme Court, in *Norman* v. *Baltimore & Ohio R. R. Co.,* 294 U. S. 240, 311, 312-313, said:

> * * * That point is whether the gold clauses do constitute an actual interference with the monetary policy of the Congress in the light of its broad power to determine that policy. Whether they may be deemed to be such an interference depends upon an appraisement of economic conditions and upon determinations of questions of fact. With respect to those conditions and determinations, the Congress is entitled to its own judgment. We may inquire whether its action is arbitrary or capricious, that is, whether it has reasonable relation to a legitimate end. If it is an appropriate means to such an end, the decisions of the Congress as to the degree of the necessity for the adoption of that means, is final. *McCulloch* v. *Maryland, supra,* pp. 421, 423; *Juilliard* v. *Greenman, supra,* p. 450; *Stafford* v. *Wallace,* 258 U. S. 495, 521; *Everard's Breweries* v. *Day,* 265 U. S. 545, 559, 562.

* * * * *

And the Joint Resolution itself recites the determination of the Congress in these words:

"Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all

> times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts."
>
> Can we say that this determination is so destitute of basis that the interdiction of the gold clauses must be deemed to be without any reasonable relation to the monetary policy adopted by the Congress?
>
> The Congress in the exercise of its discretion was entitled to consider the volume of obligations with gold clauses, as that fact, as the report of the House Committee observed, obviously had a bearing upon the question whether their existence constituted a substantial obstruction to the congressional policy.
>
> * * *.

Contentions have been advanced to the effect that the finding that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities immense in amount and retroactive in operation, taken together with Section 2 of the Act, which relieves employers of liability for past "portal-to-portal" claims, in effect constitutes an attempted "judicial" decision of the Congress overruling the decision of the Supreme Court in the *Mt. Clemens Pottery* case. Of course, this is neither theoretically nor actually true. There is no suggestion in the Court's opinion in that case that the decision was based in any way upon customs, practices, or contracts (because none were involved), or that the liabilities created by the Fair Labor Standards Act,

thus construed, were expected by employers, or that, in practical effect, the announcement of such liabilities would not operate in the same manner as if the liabilities had been created by the decision. Arguments to the effect that, at least after the decisions in *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590, and *Jewell Ridge Corp.* v. *Local* 325 U. S. 161, employers generally should have expected and prepared for the decision in the *Mt. Clemens* case fall far short of refuting the legislative finding that they did not actually do so. See and cf. *Anderson* v. *Mt. Clemens Pottery Co.* (D. C., E. D., Mich., February 8, 1947), 69 F. Supp. 710, 712, 719-721.

Whatever may have been the opinions of the individual members of the Congress concerning the correctness of the decisions in the *Mt. Clemens* case, the validity of the Act must be tested by its operative provisions rather than by supposed motives read from between the lines. *Cf. Pope* v. *United States,* 323 U. S. 1, 3, 9. By its actual effect rather than by the language employed. *Stockdale* v. *Atlantic Insurance Co.,* 20 Wall. 323, 22 L. Ed. 348, 351.

With reference to this subject, the opinion of the United States Circuit Court of Appeals for the Fourth Circuit in *Seese* v. *Bethlehem Steel Company,* 168 F. (2d) 58, written by Circuit Judge Parker, is in part as follows:

> Plaintiffs contend, however, that the provisions of the statute just quoted are violative of the Constitution (1) in that they represent the exercise by Congress of judicial power and (2) in that they deprive plaintiffs of vested rights under

existing contracts in violation of the due process clause of the Fifth Amendment. We think that both contentions are entirely without merit.

The first contention requires but brief notice. It is true that the effect of the act is to take away rights held by the courts to arise under a statute as they have interpreted it, but this is done, not by the exercise of judicial but of legislative power. When the Fair Labor Standards Act was interpreted by the Supreme Court as requiring computation in the work week of time consumed in walking to work and other preliminary activities, this was just as though the original act contained express provision to that effect; and, when Congress passed the sections of the statute here under consideration, the effect was to repeal the original statute to the extent of that coverage and deny to the federal courts jurisdiction to entertain a suit based thereon. This does not in any manner affect adjudications already made, nor does it attempt to direct the courts in the exercise of judicial power. All that it does is to define rights, i. e., to amend or limit the effect of a prior statute so as to take away a cause of action given by it. *Ackerman* v. *J. I. Case Co.,* 74 F. Supp. 639; *Hollingsworth* v. *Federal Mining & Smelting Co.,* 74 F. Supp. 1009; note 49 Harvard Law Review 137, 140. Even where an act is declaratory in form as well as retroactive, it will be upheld ordinarily in those cases where retroactive legislation is permissible. *Graham & Foster* v. *Goodcell,* 282 U. S. 409, *Stockdale* v. *Insurance Companies,* 20 Wall. 323.

In other words, the Congress legislated with reference to an existing state of affairs and the Act had

prospective rather than retrospective operation. It cut off certain existing statutory claims which, while based upon past legislation and past activities, were none the less existing claims at the time the Act was passed.

Apparently the mere fact, that the Supreme Court had in the *Mt. Clemens Pottery* case declared, subject to the *"de minimis"* doctrine, that "portal-to-portal" activities were compensable, is relied upon, *sub silentio,* as having the effect of converting otherwise valid legislation into an usurpation of judicial power. Here, again, the Gold Clause case is in point. There, as here, the claims in question had been sustained by the courts (*e. g., Gregory* v. *Morris,* 96 U. S. 619), and although based upon contracts rather than a statute, unquestionably such claims would have continued to be valid and enforcable in the absence of the legislation. Obviously, legislation designed to alter the consequences of prior legislation cannot be considered more of an infringement of the judicial function than legislation abrogating contractual obligation. Accordingly, the decision of the Supreme Court sustaining the Congressional abrogation of gold clauses should be dispositive of the point. *Norman* v. *Baltimore & Ohio R. R. Co., supra.*

Accordingly, it is submitted, the Congressional findings and declaration of policy set forth in Section 1 of the Portal-to-Portal Act of 1947 are constitutionally valid in all respects.

**2. Section two of the Act constitutionally relieves employers of liability on existing portal-to-portal claims**

Part II of the Portal-to-Portal Act of 1947 deals with existing claims under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act. Section 2 of the Act is, in relevant part, as follows:

> (a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, * * * (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—
>
> (1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or
>
> (2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.
>
> (b) For the purposes of subsection (a), an activity shall be considered as compensable un-

der such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, * * * in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsection (a) and (b) of this section.

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, * * * to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

It will be observed that Congress does not attempt in any way to interfere with the enforcement of claims other than those sought to be asserted *under* its prior legislation. Its provision is that "no employer shall be subject to any liability * * * *under* the Fair Labor Standards Act of 1938, as amended" (italics supplied). Therefore, any claim which can be as-

serted independently of the prior legislation is, to that extent, not affected by the Act. Moreover, claims based upon activities which were compensable under express provisions of written or unwritten contracts, or by custom or practice, continue to be enforceable *under* the Act. Accordingly, there can be no merit to any contention that Section 2 of the Portal-to-Portal Act is unconstitutional because the claims that it purports to bar are contract claims.

In other words, if any "portal-to-portal" claim rests sufficiently upon contract that it may be enforced independently of the Fair Labor Standards Act, its enforcement in that manner is in no way barred by the Portal-to-Portal Act. However, it is clear that employers are relieved of liability on "portal-to portal" claims which rest upon the prior legislation, and that employees' rights to enforce such claims have been revoked, unless the Congress, for some reason, lacked constitutional power to withdraw the support of the earlier legislation.

**(a) Congress had plenary power to terminate the purely statutory rights conferred by the Fair Labor Standards Act**

As indicated above, by the Portal-to-Portal Act, the Congress has not sought to disturb any claim to any extent that it does not rest exclusively upon its prior legislation, in the sense that it would be valid apart from such legislation. The Congress has found that the Fair Labor Standards Act has been interpreted so as to create "wholly unexpected liabilities" under which employees would receive "windfall payments * * * for activities performed by them without any expectation of reward beyond that included in

their agreed rates of pay." These are claims that the Congress obviously intended to reach and to bar by the Act. As to employees such benefits were purely statutory [11] and can be likened to statutory gratuities. As to employers such unexpected liabilities can be likened to statutory penalties.[12]

Of course, the Congress may terminate statutory gratuities and penalties at any time. The mere repeal of a statute providing for penalties, without a saving clause, terminates prior liability thereunder. *Norris* v. *Crocker,* 13 How. 429, 440. See also, *United States* v. *Chambers,* 291 U. S. 217, 222-226 (and authorities there cited). And, in absence of contractual obligation, statutory gratuities may be withdrawn at any time at the will of the Congress. See and *cf. Norris* v. *Crocker, supra; Lynch* v. *United States,* 292 U. S. 571, 577 (and cases there cited).

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[11] See, *e. g., Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590, 602-603; *Jewell Ridge Corporation* v. *United Mine Workers,* 325 U. S. 161, 167; *Brooklyn Bank* v. *O'Neil,* 324 U. S. 697, 704.

[12] The civil liabilities to employees imposed by the Fair Labor Standards Act upon "Any employer who violates" its provisions (29 U. S. C. § 216 (b) had two distinct, if integrated, purposes, *i. e.,* (1) to enforce its provisions relative to minimum wages and maximum hours (id. §§ 206 & 207) and (2) to provide for the payment of fair compensation to employees. Accordingly, while the benefits conferred upon employees are personal to them, they are nonetheless enforcement provisions of the Act which could not be contracted away. See and *cf., e. g., Overnight Motor Co.* v. *Missel,* 316 U. S. 572; *Brooklyn Bank* v. *O'Neil,* 324 U. S. 697. Inasmuch as the "portal-to-portal" benefits of the Act came as a "windfall" to employees, they may be regarded as pure statutory benefits subject to the further exercise of the legislative power that brought them into being—and, in respect of the enforcement aspects of the liabilities thus imposed upon employers, they obviously have all the attributes which make penalties equally subject to the legislative will.

As stated by the Supreme Court in the case of *Flanigan* v. *Sierra County,* 196 U. S. 553, 560:

> The general rule is that powers derived wholly from a statute are extinguished by its repeal. *Sutherland on Statutory Construction,* § 165. And it follows that no proceeding can be pursued under the repealed statute, though begun before the repeal, unless such proceedings be authorized under a special clause in the repealing act, *9 Bacon's Abridgement, 226.*

Accordingly it is clear that rights arising from and depending upon legislation alone may be terminated at the will of the legislative body.[13] For this reason the United States Circuit Court of Appeals for the Sixth Circuit found Sections 9 and 11 of the Portal-to-Portal Act to be constitutional in *Rogers Cartage Co.* v. *Reynolds,* 166 F. (2d) 317, saying:

> Sections 9 and 11 of the Portal-to-Portal Act are constitutional. Congress, in the exercise of its power to regulate interstate commerce, may interfere with valuable property rights. *North American Co.* v. *Securities & Exchange Commission,* 327 U. S. 686, 703; *American Power & Light Co.* v. *Securities & Exchange Commission,* 329 U. S. 90. While the rights given to employees under the Fair Labor Standards Act are substantial, they did not exist at common law, nor were they established by the United

[13] See and *cf. Western Union Telegraph Co.* v. *Louisville & Nashville Ry.,* 258 U. S. 13, 19-22; *McNair* v. *Knott,* 302 U. S. 369, 372-374 (and cases there cited); *Chase Securities Corp.* v. *Donaldson,* 325 U. S. 304, 311-312, 314-316; *Louisiana* v. *Mayor,* 109 U. S. 285, 287-288; *In re Hall,* 167 U. S. 38, 42; *Cummings* v. *Deutsche Bank,* 300 U. S. 115, 124; *National Carloading Corp.* v. *Phoenix-El Paso Express,* 176 S. W. (2d) 564, 569-570, cert. den. 322 U. S. 747.

> States Constitution. Since they are purely the creature of Statute, they may be altered or abolished by the Congress which established them at any time before they have ripened into final judgment. Cf. *Western Union Telegraph Co.* v. *Louisville & Nashville Ry. Co.,* 258 U. S. 13; *Kline* v. *Burke,* 260 U. S. 226, 234. The constitutionality of the Act has been recently considered in various District Courts, and invariably upheld. Cf. *Boehle* v. *Electric Metallurgical Co.,* 72 Fed. Supp. 21.

For the same reason the Circuit Courts of Appeals for the Second and Fourth Circuits held that Section 2 is clearly constitutional. *Seese* v. *Bethlehem Steel Co.* (4 Cir.), 168 F. (2d) 58; *Battaglia* v. *General Motors Corp.* (2 Cir. decided July 8, 1948), 8 WH Cases 108, 15 Labor Cases, par. 64,619. In so ruling in the *Seese* case, the Court, among other things, said:

> What was taken away was the right to recover on claims of purely statutory origin, claims given by statute not as compensation for labor performed but as a means of regulating wages and hours of work in interstate commerce. *Missel* v. *Overnight Transportation Co.,* 316 U. S. 572; *Brooklyn Savings Bank* v. *O'Neil,* 324 U. S. 697. Even where the contract clause is a limitation upon legislative power, it is universally held that such a claim may be taken away by the legislature without violation of constitutional right. Since the legislature may repeal its own act, it may take away that which has no existence save by virtue of that act. *Norris* v. *Crocker,* 13 How. 429; *Ewell* v. *Daggs,* 108 U. S. 143, 151; *Pearsall* v. *Great Northern R. Co.,* 161 U. S. 646; *A. C. L. R. Co.*

v. *Goldsboro,* 232 U. S. 548; *West Side R. Co.* v. *Pittsburgh Const. Co.,* 219 U. S. 92; *National Carloading Corp.* v. *Phoenix-El Paso Express, supra.* The reason underlying the rule was stated by Mr. Justice Matthews in *Ewell* v. *Daggs, supra,* as follows:

"And these decisions rest upon solid ground. * * * The more general and deeper principle on which they are to be supported, is that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains in fieri, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract."

Looked at in another way, all that Congress has done by the legislation here under consideration is to validate the contracts and agreements between employer and employee which were invalid under the Fair Labor Standards Act by reason of the interpretation placed by the Supreme Court upon that act; and the authority of the legislative body to validate voluntary transactions which at the time they were entered into were by statute invalid or illegal has been repeatedly upheld. *West Side R. Co.* v. *Pittsburgh Const Co.,* 219 U. S. 92; *McNair* v. *Knott,* 302 U. S. 369, 372. In other words, the contracts of employment which contemplated that no payment should be made for the portal-to-portal activities but that these were to be compensated by the agreed wage,

> were invalid only because of the provisions of the Fair Labor Standards Act. There was nothing in law or in reason which forbade Congress to give validity to these contracts retroactively, just as the invalid pledge of securities by National Banking Associations was validated by retroactive legislation in the case of *McNair* v. *Knott, supra.*
>
> Plaintiffs rely upon such cases as *Steamship Co.* v. *Joliffe*, 2 Wall. 450; *Ettor* v. *City of Tacoma,* 228 U. S. 148; *Coombes* v. *Getz,* 285 U.S. 434; and *Duke Power Co.* v. *South Carolina Tax Com'n,* 4 Cir. 81 F. 2d 513; but these cases are not in point. They were concerned with vested property rights based on agreements and not on mere statutory provisions without contract or agreement to support them. * * *.

Among the cases thus distinguished are those upon which chief reliance is placed by the appellant (brief, pp. 15-23.[14] The Court further said:

> There is nothing in the result accomplished by the statute upon which it can be condemned as an unreasonable exercise of the commerce power by Congress. As a matter of fact, all that it does is prevent employees reaping an unexpected windfall from an unexpected court decision. In another

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[14] In the *Ettor* case, for example, the existence of the statute reasonably tended to assure the property owner that he would be reimbursed for damage so that his failure to take protective measures, in *reliance* thereon, constituted a change of position in a contractual sense. (Cf. discussion of these cases in *McLaughlin* v. *Todd & Brown, Inc.,* D. C. Ind., 7 WH Cases 1014.) Here, however the right to "portal-to-portal" pay was wholly of statutory creation, was not given in substitution for either a contract or property right which otherwise would have been received or would have continued to exist, and "this is not a case where appellants conduct would have been different if the present rule had been foreseen" (*Chase Securities Corp.* v. *Donaldson, supra;* 316).

> situation where parties were about to be enriched by unexpected profits resulting from another decision, Congress passed the "windfall" tax act of 1936 (Revenue Act of 1936, Title III, sec. 501 (a), 26 USCA 345 (a) (1)), taking 80% of the windfall for the government by way of retroactive taxation. We held the tax valid in *White Packing Co.* v. *Robertson,* 4 Cir. 89 F. 2d 775. See also *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337. There is certainly nothing unreasonable or arbitrary in the repeal of the provisions of an act which would make possible the recovery of a "windfall" which would have such disastrous effects upon commerce as Congress foresaw and pointed out.

However, in a number of the cases in which the constitutionality of the Portal-to-Portal Act has been challenged, the suggestion has been advanced that while the claims barred by Section 2 of the Act may not be contract claims in the pure sense, they nonetheless partake of the contract of employment because all contracts are entered into with implied reference to the existing laws bearing upon the contractual relationship. In *Seese* v. *Bethlehem Steel Co., supra,* the Court answered this contention as follows:

> It is argued that the provisions of the statute must be read into the contract of employment and that the right to recover compensation in accordance with its terms accrues upon the rendering of services. As stated above, however, the true situation with respect to claims affected by the Portal-to-Portal Act is that that act validates the real contract between the parties and merely takes away a statutory remedy given by the prior act. Even if the provisions of the Fair Labor Standards

Act be read into contracts of employment, so also must be read the constitutional power of Congress to change that act.

It is a predicate of the Act in question that there must have been no consciousness of intention on the part of the contracting parties that portal-to-portal activities be compensable. Accordingly, the only implied-in-fact agreement on the part of the employer and his employees, which could be said to have a bearing on the matter, would be their implicit agreement to comply with the provisions of the Fair Labor Standards Act as they might thereafter be interpreted by competent authority. However, it is unthinkable that an employer would have intended to bind himself to continue to adhere to such an interpretation beyond the period of time that he was under legal obligation to do so.

Any suggestion that the statutory provision for compensability of "portal-to-portal" activities became an irretrievable part of each employment contract by force of law should be equally fruitless. "Not only are existing laws read into contracts in order to fix obligations as between parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 435. Notwithstanding appellees contention (Brief, pp. 10-13) that the Portal-to-Portal Act constituted a veto of the earlier legislation, no provision of the Fair Labor Standards Act required either implied or actual incorporation of its terms by parties to such a contract, as terms of the agreement, in such form that later congresses would be unable to alter the conditions of the employment rela-

tionship without abrogating the contract provisions.[15] Any attempt on the part of one Congress so to tie the hands of a future Congress would obviously be open to most serious question on constitutional grounds. (See and *cf., e. g., Lynch* v. *United States,* 292 U. S. 571; *North American Com. Co.* v. *United States,* 171 U. S. 110, 137; *United Shoe Machinery Co.* v. *United States,* 258 U. S. 451, 463; *Boyd* v. *Alabama,* 94 U. S. 645, 650; *Stone* v. *Mississippi,* 101 U. S. 814, 817-818; *Atlantic Coast Line R. Co.* v. *Goldsboro,* 232 U. S. 548, 558). Plainly no such result was intended and the act cannot properly be given that effect. Cf. *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 577.

Accordingly, it is clear that insofar as rights given by the Fair Labor Standards Act have not, in fact, become terms of employment contracts they may be withdrawn by the Congress. Section 2 of the Portal-to-Portal Act of 1947 which relieves employers of the liability of the so-called portal-to-portal claims goes no further and is clearly constitutional.

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[15] Bearing in mind the finding of the Congress that the compensability of "portal-to-portal" activities came as a surprise to employers and as an unexpected windfall to employees, it is evident that there is no basis for the application of cases holding that existing rights of enforcement, which have been appended to contracts by state law, and which were presumably known to and relied upon by the parties, become parts of the obligation of contracts which the states are forbidden to impair. See, *e. g., Coombes* v. *Getz,* 285 U. S. 434, 442; *Hawthorne* v. *Calef,* 2 Wall. 10, 22-23 (*cf. Ochiltree* v. *Railroad Co.,* 21 Wall. 249, 252-254); *Treigle* v. *Acme Homestead Assn.,* 297 U. S. 189, 194. Cf. *McCullough* v. *Virginia,* 172 U. S. 102, 122-125; *Marcus Brown Holding Co., Inc.* v. *Feldman,* 256 U. S. 170, 198; *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 435; *Pritchard* v. *Norton,* 106 U. S. 124, 132, 136-137; *Chase Securities Corp.* v. *Donaldson, supra,* 315-316; *Von Hoffman* v. *City of Quincy,* 4 Wall. 535, 550; *Gibbes* v. *Zimmerman,* 290 U. S. 326, 332; *Vance* v. *Vance,* 108 U. S. 514, 518-522.

**(b) The Congress had constitutional authority to abrogate the claims in question in order to accomplish legitimate public purposes through the exercise of its interstate commerce power**

Even without its plenary power to terminate the purely statutory claims involved by withdrawing their legislative support, the Congress clearly had the power to do so through exercise of its powers over interstate commerce. Although no court has found it necessary so to decide, this would be so even if the claims were not purely statutory.

Article I, Section 8, of the Constitution gives to the Congress the power:

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Under Section 1 of the Portal-to-Portal Act of 1947, the Congress has found that the continued validity of the subject claims would constitute a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce. And it has declared it to be its policy "to relieve and protect interstate commerce from practices which burden and obstruct it." There can be no question as to the constitutional validity of the end sought to be reached by the Congress. This is the same end that was sought through the enactment of the Fair Labor Standards Act, upon which such claims depend, the validity of which has been established beyond question. *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 576-577; *United States* v. *Darby,* 312 U. S. 100; *Opp. Cotton Mills* v. *Administrator,* 312 U. S. 126.

As shown in the previous discussion of the findings and policy of the Congress in Section 1 of the Act, it is primarily for the Congress to determine whether and to what extent the existence of such claims interferes with the legislative objective. *Norman* v. *Baltimore & Ohio R. R. Co.,* 294 U. S. 240, 311-313. There can be no serious question that the findings and policy of the Congress amply support the measures taken by it in Section 2 of the Portal-to-Portal Act.

While Section 10 of Article 1 of the Constitution provides that "No State shall * * * pass any * * * law impairing the obligation of Contracts" and "does not in terms restrict Congress and the United States" (*New York* v. *United States,* 257 U. S. 591, 601), it is clear that contract rights, like other property rights, are protected by the Fifth Amendment. *Omnia Co.* v. *United States,* 261 U. S. 502, 508; cf. *Louisville Joint Stock Bank* v. *Radford,* 295 U. S. 555, 589; *Wright* v. *Vinton Branch,* 300 U. S. 440, 457. However, it is equally clear that like other property rights, they are owned subject to the possibility of uncompensated destruction resulting from the valid exercise of Congressional powers. *Omnia Co.* v. *United States, supra,* 508-510. All contractual relationships between private parties are entered into not only subject to the existing laws of the United States but, as well, to the changes which the Congress may validly make in such laws. Thus in *Louisville & Nashville R. R.* v. *Mottley,* 219 U. S. 467, where for valuable consideration a contract had been made to issue free transportation to an individual, the railroad company was thereafter relieved of liability thereunder by an act of Congress interdict-

ing the use of "free transportation." In so holding the Court (at. p. 42) said:

> Long before the above cases were decided, it was said in *Knox* v. *Lee,* 12 Wall. 457, 551, that "as in a state of civil society property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the Government, and no obligation of a contract can extend to the defeat of legitimate Government authority."

Again in upholding the validity of congressional action in abrogating gold clauses in private bonds [16] the Supreme Court, through Mr. Chief Justice Hughes, in *Norman* v. *Baltimore & Ohio R. R. Co., supra* (at p. 307), said:

> Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a

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[16] Attempts to distinguish the *Norman* case, upon the ground that the creditor could still collect in dollars—hence no property was taken from him—lose sight of the fact that the decision applied as well to "gold value" contracts as to contracts for payment in gold. See the *Norman* case, *supra,* at pp. 298-302; *Guaranty Trust* v. *Henwood,* 307 U. S. 247, 259-261. The legislation struck down contracts for payment of greater sums of money to be measured by the increased money value of a quantity of gold as well as contracts calling for payment in *speci. Holyoke Power Co.* v. *Paper Co.,* 300 U. S. 324, 334, 337-340. By reason of the enactment of the legislation the beneficiaries of "gold clause" obligations became entitled to fewer dollars than they had had a contract right to receive prior to its enactment. The *Norman* case is clearly in point. Likewise, arguments to the effect that the doctrine of the *Norman* case was overruled *sub silentio* by the later decision in *Louisville Bank* v. *Radford, supra,* are conclusively refuted by the still later decisions in other cases cited in this note, *supra.*

> congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.

In *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 577, with reference to the constitutional applicability of the overtime provisions of the Fair Labor Standards Act to a contract of release there involved, the Supreme Court, through Mr. Justice Reed, stated:

> If overtime pay may have this [beneficial] effect upon commerce, private contracts made before or after the passage of legislation regulating overtime cannot take the overtime transactions "from the reach of dominant constitutional power." *Norman* v. *B. & O. R. Co.,* 294 U. S. 240, 306-311.

And, as previously shown, nothing in the Fair Labor Standards Act can properly be construed as an attempt by the Congress to place contracts embodying its terms beyond such "reach."

It is not contended that the power of the Congress to abrogate private rights in order to reach constitutionally authorized legislative objectives is merely a power to deal with emergencies, as appellants suggest. Rather, the principle of Federal supremacy in the field of delegated powers inheres in the Constitution itself (Art. VI) and has found frequent and varied expression in the decisions of the Supreme Court.[17]

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[17] In addition to the numerous cases cited in the opinion of the Supreme Court in *Norman* v. *Baltimore & Ohio R. R. Co., supra,* pp. 307-311, see and compare *Fleming* v. *Rhodes,* 331 U. S. 100, 107; *Guaranty Trust Co.* v. *Henwood,* 307 U. S. 247, 258-259; *American Power Co.* v. *S. E. C.,* 329 U. S. 99-100, 103-104; *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 435; *DeLaval Steam Turbine Co.* v. *U. S.,* 284 U. S. 61, 73; *Mitchell* v. *Clark,* 110 U. S.

Since the rights which have been found to have been given employees by the Fair Labor Standards Act, did not involve any pledge of "the credit of the United States" (*cf. Perry* v. *United States,* 294 U. S. 330, 350-351; *Lynch* v. *United States,* 292 U. S. 571), the employees' position to resist the exercise of the interstate commerce power by the Congress, through the Portal-to-Portal Act, certainly is not improved by the fact that their claims depend for validity upon prior legislation of the Congress rather than upon contracts. As previously indicated, the Congress has plenary power to withdraw benefits conferred by and resting exclusively upon its prior legislation. Moreover, in absence of the exercise of a constitutional power requiring the assumption of a continuing obligation on the part of the United States, an earlier Congress may not validly restrict later Congresses from exercising their constitutional powers. See *Lynch* v. *United States, supra,* 579; *North American Com. Co. v. United States,* 171 U. S. 110, 137; *United Shoe Machinery Co.* v. *United States,* 258 U. S. 451, 463.

It follows that, even if the rights conferred by the Fair Labor Standards Act could be regarded as "vested" rights in the same sense that contract rights are "vested" rights, the Congress could constitutionally terminate them in the exercise of its power to regulate interstate commerce.

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633, 643; *Veix* v. *Sixth Ward Assn.,* 310 U. S. 32, 38-41; *Calhoun* v. *Massie,* 253 U. S. 170, 175-176; *Wright* v. *Union Central Ins. Co.,* 304 U. S. 502, 516; *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 429-430; *North American Co.* v. *S. E. C.,* 327 U. S. 686, 707-708; *Holyoke Power Co.* v. *Paper Co.,* 300 U. S. 324, 341; *Bowles* v. *Willingham,* 321 U. S. 503, 516-619; *Steuart & Bro.* v. *Bowles,* 322 U. S. 398, 405.

**3. In relieving the courts of jurisdiction to entertain portal-to-portal cases, the Congress acted within its constitutional authority**

In Section 1 of the Portal-to-Portal Act, the Congress found that if the Fair Labor Standards Act, so interpreted as to give validity to "portal-to-portal" claims, or such claims "were permitted to stand, * * * the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged," and it declared it "to be the policy of the Congress in order to meet the existing emergency and to correct existing evils" among other things "to define and limit the jurisdiction of the courts." The tremendous volume of litigation involving such claims has been commented upon in the discussion of the legislative history of the Act, *supra*. The statistics adequately speak for themselves.

In Subsections (a) through (c) of Section 2 of the Portal-to-Portal Act of 1947, the Congress relieved employers of liability on such claims and prohibited the inclusion of time devoted to so-called "portal-to-portal" activities in computing the working time of employees for the purpose of application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act. In Subsection (d) it relieved the courts of

> jurisdiction of any action or proceeding * * * to enforce liability or impose punishment for or an account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act * * * to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with

respect to an activity which was not compensable under Subsections (a) and (b) of this Section.

Any attack upon the constitutionality of Section 2 of the Portal-to-Portal Act must, of necessity, constitute an attack upon this portion of the legislation because, without jurisdiction of the cause, the Court could not properly pass upon the validity of any portion of the statute.

By Article I, Section 8, of the Constitution, the Congress is given power "to constitute Tribunals inferior to the Supreme Court" and Article III provides that "the judicial power of the United States, shall be vested in one supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish" and that, except in the cases in which the Supreme Court is given original jurisdiction, "the Supreme Court shall have appellate jurisdiction both at Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The Constitution clearly contemplates that the judicial branch of the Government shall exercise the judicial power of the United States free of interference from the legislative branch,[18] but, excepting the original jurisdiction conferred upon the Supreme Court by the Constitution itself, the Congress was clearly given the power to define the cases in which the judicial power shall be exercised.

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[18] Cf. *United States* v. *Klein*, 13 Wall. 128; *Pope* v. *United States*, 100 C. Cls. 375, 53 F. Supp. 570, 572-574 (reversed in 323 U. S. 1; reversal explained 62 F. Supp. 408, 411).

In *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 234, the Supreme Court, speaking through Mr. Justice Sutherland, said:

> * * * Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. *Turner* v. *Bank of North America,* 4 Dall. 8, 10; *United States* v. *Hudson & Goodwin,* 7 Cranch, 32; *Seldon* v. *Sill,* 8 How. 441, 448; *Stevenson* v. *Fain,* 195 U. S. 165. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an Act of Congress to confer it. *The Mayor* v. *Cooper,* 6 Wall. 247, 252. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall. *The Assessors* v. *Osborne,* 9 Wall. 567, 575. A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an Act of Congress after its exercise has begun, cannot well be described as a constitutional right.

See and compare, also, *Lauf* v. *E. G. Shinner & Co.,* 303 U. S. 323, 330; *Railroad Company* v. *Grant,* 98 U. S. 398, 401, 402 (and cases cited); *Lockerty* v. *Phillips,* 319 U. S. 182, 187; *Ex parte McCardle,* 7 Wall. 506, 514; *Norris* v. *Crocker,* 13 How. 429, 439, 440; *In re Hall,* 167 U. S. 38, 42; *Insurance Company* v. *Ritchie,*

5 Wall. 541, 544; *Smallwood* v. *Gallardo,* 275 U. S. 56; *Levering & Garrigues Co.* v. *Morrin,* 71 F. (2d) 284, 287 (CCA 2, 1934), cert. den. 293 U. S. 595; *Railroad Co.* v. *Grant,* 8 Otto 398, 401-402.

The attacks which have been made upon the constitutionality of Section 2 (d) of the Act, which have thus far come to our attention, have been based primarily upon decision holding that States may not destroy or so change remedies as to impair the obligation of contracts.[19] Since Section 10 of Article I of the Constitution, under which such State action is invalidated, is not applicable in terms to the Federal Government and since the Congressional authority over the jurisdiction of the federal courts is given by the Constitution itself in plenary terms, such cases are inapposite where the jurisdiction of federal courts is concerned.[20] Moreover, as we have shown in earlier por-

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[19] E. g., *Walker* v. *Whitehead,* 16 Wall. 314; *Edwards* v. *Kearzey,* 96 U. S. 595, 607; *South Carolina* v. *Goullard,* 101 U. S. 433; *Tennessee* v. *Snead,* 96 U. S. 69; *Worthen* v. *Thomas,* 292 U. S. 426, 431-432; Cf. *Gibbes* v. *Zimmerman,* 290 U. S. 326, 332; *Bronson* v. *Kinzie,* 1 How. 311, 320. *Grignon's Lessee* v. *Astor, et al.,* 2 How. 319, 341-344; *Elliott* v. *Peirsol,* 1 Pet. 328, 340-341; *Worthen Co.* v. *Kavanaugh,* 295 U. S. 56; *Richmond Corp.* v. *Wachovia Bank,* 300 U. S. 124; *Wheeler* v. *Jackson,* 137 U. S. 245; *Sturges* v. *Crowninshield,* 4 Wheat. 122, 197-201; *Sohn v. Waterson,* 17 Wall. 596; *Terry* v. *Anderson,* 95 U. S. 628, 632-633; *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398; *Fletcher* v. *Peck,* 6. Cranch 87, 135-137; *New Jersey v. Wilson,* 7 Cranch 164.

[20] While the constitutionality of the provision of Section 2 (d) withdrawing from State courts jurisdiction to entertain portal-to-portal actions cannot properly be in question here, it may be of interest that the report of the House Committee on the Judiciary (No. 71, to Accompany H. R. 2157, 80th Cong., 1st Sess., p. 6) indicates that it relied upon *Bowles* v. *Willingham,* 321 U. S. 503, as establishing the power of the Congress to withdraw from state courts the adjudication of causes arising out of Federal statutes. See and *cf.,* also, *Collector* v. *Hubbard,* 12 Wall. 1, 15, and cases cited *supra* in support of the Congresional power to terminate rights conferred exclusively by Federal statutes.

tions of this Brief, no contract claim is affected by Section 2 (d) of the Act.

No necessity arises in these actions to consider the question of whether the power of the Congress to withdraw cases from the jurisdiction of the District Courts is in fact plenary in the sense that it could be exercised arbitrarily or capriciously. Obviously, these are not such cases. Section 2 (d) of the Act is clearly constitutional.

## CONCLUSION

For the foregoing reasons the decisions of the Court herein should sustain the constitutionality of the Portal-to-Portal Act of 1947.

Respectfully submitted.

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APPENDIX A

REPORTED DECISIONS OF UNITED STATES DISTRICT COURTS SUSTAINING THE CONSTITUTIONALITY OF THE PORTAL-TO-PORTAL ACT OF 1947 [21]

*Ackerman* v. *J. I. Case Co.* (Wisconsin), 74 F. Supp. 639.

*Adkins* v. *E. I. duPont de Nemours & Co.* (Oklahoma), 13 Labor Cases, par. 64,025, 7 WH Cases 298.

*Alameda* v. *Paraffine Co., Inc.* (California), 75 F. Supp. 282.

*Bateman* v. *Ford Motor Company* (Michigan), 76 F. Supp. 178.

*Blessing* v. *Hawaiian Dredging Co.* (Dis. of Col.), 76 F. Supp. 556.

*Boehle* v. *Electro Metallurgical Co.* (Oregon), 72 F. Supp. 21.

*Bonner* v. *Elizabeth Arden* (New York), 13 Labor Cases, Par. 64,147, 7 WH Cases 469.

*Borucki* v. *Continental Baking Co.* (New York), 74 F. Supp. 815.

*Breusing* v. *Fisher Body Division* (Missouri), 74 F. Supp. 541.

*Bumpus* v. *Remington Arms Co.* (Missouri), 74 F. Supp. 788.

*Burfeind* v. *Eagle-Picher Co. of Texas* (Texas), 71 F. Supp. 929.

*Cardinale* v. *General Motors Corp.* (Georgia), 13 Labor Cases, par. 64,088, 7 WH Cases 378.

*Cochran* v. *St. Paul & Tacoma Lumber Co.* (Washington), 73 F. Supp. 288.

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[21] In addition to the cases appearing in this list, and not counting the 267 portal-pay suits dismissed within six weeks after the enactment of the Portal-to-Portal Act (1947 WH 1632), we have been advised of more than 70 District Court decisions dismissing such suits as to which we have been unable to locate published reports.

*Colvard* v. *Southern Wood Preserving Co.* (Tennessee), 74 F. Supp. 804.

*Darr* v. *Mutual Life Insurance Company of New York* (New York).

*DeMaio* v. *Grant Storage Battery Co.* (Minnesota), 14 Labor Cases, par. 64,285, 7 WH Cases 721.

*Ditto* v. *American Aluminum Co.* (California), 73 F. Supp. 955.

*Donovan* v. *Republic Steel Corp.* (New York), 14 Labor Cases, par. 64,295, 7 WH Cases, 644.

*Elting* v. *North American Aviation, Inc. of Kansas* (Kansas), 13 Labor Cases, par. 64,154, 7 WH Cases, 491.

*Ferrer* v. *Waterman Steamship Corporation* (Puerto Rico), 76 F. Supp. 60.

*Glowienke* v. *Hawaiian Dredging Co.* (Illinois), 14 Labor Cases, par. 64,343, 7 WH Cases, 637.

*Grazeski* v. *Federal Shipbuilding & Dry Dock Co.,* (New Jersey), 76 F. Supp. 845.

*Hart* v. *Aluminum Co. of America* (Pennsylvania), 73 F. Supp. 727.

*Hays* v. *Hercules Powder Co.* (Missouri), 13 Labor Cases, par. 64,123, 7 WH Cases, 381.

*Holland* v. *General Motors Corp.* (New York), 75 F. Supp. 274 (affirmed July 8, 1948, as *Battaglia* v. *General Motors Corp.,* 8 WH Cases 108, 15 Labor Cases, par. 64,169 (CCA 2)).

*Hollingsworth* v. *Federal Mining & Smelting Co.* (Idaho), 74 F. Supp. 1009.

*Hornbeck* v. *Dain Mfg. Co.* (Iowa), 13 Labor Cases, par. 64,005. 7 WH Cases 296.

*Jackson* v. *Northwest Airlines Inc.* (Minnesota), 76 F. Supp. 121.

*Johnson* v. *Park City Consol. Mines Co.* (Missouri), 73 F. Supp. 852.

*Kirkham* v. *Pacific Gas & Electric Co.* (California), 13 Labor Cases, par. 64,199, 7 WH Cases 582.

*Lasater* v. *Hercules Powder Co.* (Tennessee), 73 F. Supp. 264.

*Lassiter* v. *Atkinson Co.* (Washington), 7 WH Cases 816.

*Local 626, Etc.,* v. *General Motors Corp.* (Connecticut), 76 F. Supp. 593.

*Lockwood* v. *Hercules Powder Company* (Missouri), 14 Labor Cases, par. 64,366, 7 WH Cases 720.

*Markert* v. *Swift & Co.* (New York), 13 Labor Cases, par. 64,145, 7 WH Cases 459.

*May* v. *General Motors Corporation* (Georgia), 73 F. Supp. 878.

*McLaughlin* v. *Todd & Brown, Inc.,* 7 WH Cases 1014.

*Moeller* v. *Eastern Gas and Fuel Associates* (Massachusetts), 74 F. Supp. 937.

*Plummer* v. *Minneapolis-Moline Power Implement Co.* (Minnesota), 76 F. Supp. 745.

*Quinn* v. *California Shipbuilding Corp.* (California), 76 F. Supp. 742.

*Reid* v. *Day & Zimmerman, Inc.* (Iowa), 73 F. Supp. 892. (Affirmed May 25, 1948, 7 WH Cases 1040, 14 Labor Cases, par. 64,545.)

*Sadler* v. *W. S. Dickey Clay Mfg. Co.* (Missouri), 73 F. Supp. 690.

*Seese* v. *Bethlehem Steel Co.* (Maryland), 74 F. Supp. 412. (Affirmed at 168 F. (2d) 58.)

*Sinclair* v. *U. S. Gypsum Co.* (New York), 75 F. Supp. 439.

*Smith* v. *American Can Co.* (Illinois), 14 Labor Cases, par. 64,281, 7 WH Cases 603.

*Smith* v. *Cudahy Packing Co.* (Minnesota), 73 F. Supp. 141.

*Sochulak* v. *American Brake Shoe Co.* (New York), 14 Labor Cases, Par. 64,220, 7 WH Cases 584.

*Sparacino* v. *Colgate Aircraft Corp.* (New York), 13 Labor Cases, par. 64,152, 7 WH Cases 397.

*Story* v. *Todd Houston Shipbuilding Corp.* (Texas), 72 F. Supp. 690.

*Wan* v. *E. E. Black, Ltd.* (Hawaii), 75 F. Supp. 553.

*Wood* v. *Atkinson* (Washington), 14 Labor Cases, par. 64,466, 7 WH Cases 846.

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